

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:FS:MAN:TL-N-1174-01  
MBalachandran

date:

to: Richard Antoinette, Team Manager, Manhattan Appeals Office  
Attn: Appeals Team Case Leader Freddy W.H. Tang

from: Area Counsel (LMSB:FS)

subject: [REDACTED]  
Supplement to Our Memorandum Dated May 31, 2001

STATUTE OF LIMITATIONS EXPIRES [REDACTED]

UIL Nos. 6229.02-00  
6229.07-00

EIN Nos. [REDACTED] ( [REDACTED] )  
[REDACTED] ( [REDACTED] )  
[REDACTED] ( [REDACTED] )  
[REDACTED] ( [REDACTED] )  
[REDACTED] ( [REDACTED] )  
[REDACTED] ( [REDACTED] )  
[REDACTED] ( [REDACTED] )

This memorandum supplements our memorandum dated May 31, 2001 concerning the proper parties to execute consents to extend the statute of limitations when partnership items are converted to nonpartnership items pursuant to the execution of Forms 870-P.

As we noted in our May 31 memorandum, the advice we provided in that May 31 memorandum was subject to 10 day post review by the National Office. The advice in this memorandum is based on the response from National Office, incorporates that advice from the National Office, and represents our final advice.

Our advice continues to be based on the understanding that [REDACTED] was the common parent for the group for the [REDACTED] tax year.

You may use a single Form 872-F rather than the two separate forms that we had suggested in our May 31 memorandum. We

recommend that the Form 872-F should be captioned as follows:

██████████ (EIN: ██████████), as agent for ██████████  
██████████ (EIN: ██████████), a partner in the  
██████████ (EIN: ██████████), and ██████████  
██████████, as agent for the other members of the ██████████  
██████████ consolidated return group, and ██████████  
██████████. (in its own right). This is with respect to  
the tax liability of ██████████ for the tax  
year ended October 31, ██████████.

The best practice in this case is to have authorized  
officers of both ██████████ and ██████████ sign the single Form 872-F. We  
recommend that the signature block appear as follows on the Form  
872-F:

██████████, as agent for ██████████, a  
partner in the ██████████, and ██████████  
██████████, as agent for the other members of the ██████████  
██████████ consolidated return group.

██████████, a subsidiary of ██████████  
██████████ (EIN: ██████████) and ██████████  
██████████ (EIN: ██████████), and a partner in  
the ██████████.

\* \* \*

If you have any questions, telephone Murali Balachandran of  
our office at (212) 264-1595, ext. 330.

ROLAND BARRAL  
LMSB (Financial Services)  
Area Counsel,

By: \_\_\_\_\_  
THEODORE R. LEIGHTON  
Associate Area Counsel

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:LM:FSH:MAN:TL-N-1174-01  
MBalachandran

date:

to: Richard Antoinette, Team Manager, Manhattan Appeals Office  
Attn: Appeals Team Case Leader Freddy W.H. Tang

from: Area Counsel (LMSB:FSH)

subject:

**STATUTE OF LIMITATIONS EXPIRES**

UIL Nos. 6229.02-00  
6229.07-00

EIN Nos.

**INTRODUCTION**

This memorandum responds to your request for assistance on February 22, 2001. This memorandum should not be cited as precedent.

You asked our advice concerning the proper parties to execute consents to extend the statute of limitations when partnership items are converted to nonpartnership items pursuant to the execution of Forms 870-P.

This advice is subject to 10 day post review by the National Office. Accordingly, we request that you do not act on this advice until we have advised you of the National Office's comments, if any, concerning this advice.

## ISSUES

1. What entity or entities should execute consents to extend the statute of limitations on assessment with regard to partnership items converted to nonpartnership items because of the Forms 870-P executed by [REDACTED] (" [REDACTED] ") and [REDACTED] (" [REDACTED] ") with respect to the [REDACTED] for the year ending October 31, [REDACTED].
2. Who should sign the consents to extend.

## CONCLUSIONS

1. Separate consents on two Forms 872-F should be executed. One consent to be executed on behalf of [REDACTED] should be captioned "[REDACTED] (EIN [REDACTED]) as the common parent of the consolidated group that includes [REDACTED] (EIN [REDACTED]), a partner in [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN [REDACTED]), partners in the [REDACTED] (EIN [REDACTED]). This with respect to the tax liability of [REDACTED] as a partner in the [REDACTED] for the tax year ended October 31, [REDACTED]." The other consent to be executed on behalf of [REDACTED] should be captioned "[REDACTED] (EIN [REDACTED]), a subsidiary of [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN [REDACTED]), and a partner in [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN [REDACTED]), partners in the [REDACTED] (EIN [REDACTED]). This with respect to the tax liability of [REDACTED] as a partner in the [REDACTED] for the tax year ended October 31, [REDACTED]."
2. Each Form 872-F should be signed by an authorized officer of each corporation.

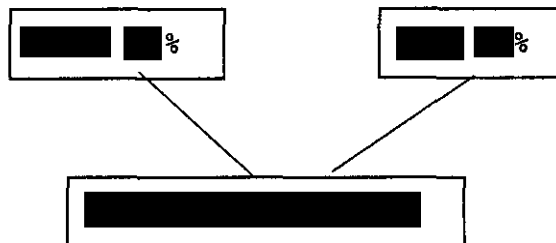
## FACTS

### Structure of the [REDACTED] Partnership

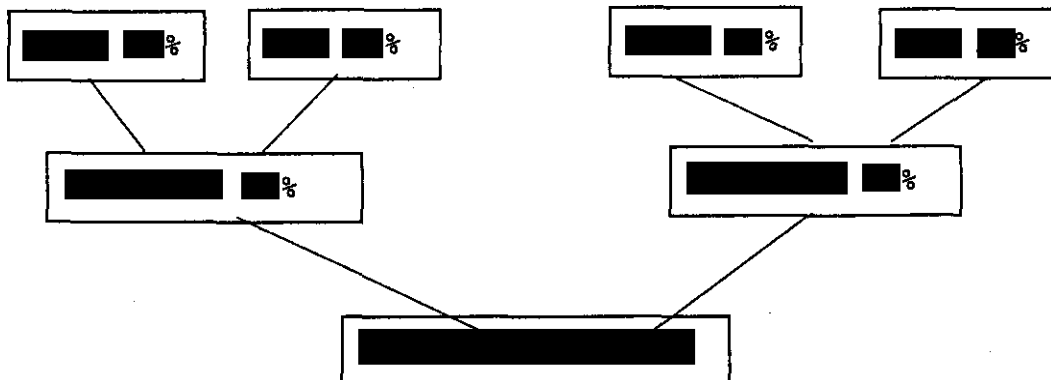
[REDACTED] owns [REDACTED]% of [REDACTED] which owns [REDACTED]% of [REDACTED] (" [REDACTED] "). [REDACTED] and [REDACTED] own [REDACTED]% of [REDACTED] as shown below. All companies filed a consolidated return.



During the year at issue, [redacted] and [redacted] (" [redacted] ") operated the [redacted] through a [redacted] joint venture. [redacted] was the tax matters partner ("TMP"). The [redacted] is a TEFRA partnership.



After [redacted], the two partners in [redacted] were [redacted] ([redacted]%) and [redacted] ([redacted]%). [redacted] was a [redacted] partner in [redacted] and a [redacted] partner in [redacted]. [redacted] was the other [redacted] partner in both partnerships and the TMP for both.



Merger

Prior to [REDACTED], [REDACTED] and [REDACTED] (" [REDACTED] ") created a holding company known as [REDACTED] (" [REDACTED] "). [REDACTED] and [REDACTED] Online were each [REDACTED] % shareholders of [REDACTED]. [REDACTED] was the parent company of two wholly-owned subsidiaries: [REDACTED] (" [REDACTED] Merger Sub"), a Delaware Corporation, and [REDACTED] (" [REDACTED] Merger Sub"), a Delaware Corporation. On [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED] Merger Sub and [REDACTED] Merger Sub entered into an Agreement and Plan of Merger ("merger agreement") (hereinafter, "the merger").

The merger agreement provided as follows:

2.1 The Mergers. Upon the terms and subject to the conditions set forth in this Agreement, and in accordance with the Delaware General Corporation Law ...

(a) [REDACTED] Merger Sub shall be merged with and into [REDACTED] (the "[REDACTED] Merger"). [REDACTED] shall be the surviving corporation in the [REDACTED] Merger and shall continue its corporate existence under the laws of the State of Delaware. As a result of the [REDACTED] Merger, [REDACTED] shall become a wholly owned subsidiary of [REDACTED].

(b) [REDACTED] Merger Sub shall be merged with and into [REDACTED] (the "[REDACTED] Merger"). [REDACTED] shall be the surviving corporation in the [REDACTED] Merger and shall continue its corporate existence under the laws of the State of Delaware. As a result of the [REDACTED] Merger, [REDACTED] shall become a wholly owned subsidiary of [REDACTED].

The merger agreement also provided that, as a result of the merger, holders of shares of [REDACTED] common stock would each receive [REDACTED] share of [REDACTED] stock. The holders of shares of [REDACTED] common stock, Series [REDACTED] stock and Series [REDACTED] common stock would each receive [REDACTED] shares of [REDACTED] common stock, [REDACTED] common stock and [REDACTED] common stock, respectively. The holders of shares of [REDACTED] Series [REDACTED] convertible preferred stock, Series [REDACTED] convertible preferred stock, Series [REDACTED] convertible preferred stock and Series [REDACTED]

preferred stock received one share of [REDACTED] Series [REDACTED] convertible preferred stock, Series [REDACTED] convertible preferred stock, Series [REDACTED] convertible preferred stock and Series [REDACTED] preferred stock, respectively.

As a result of the merger, [REDACTED] and [REDACTED] became the wholly-owned subsidiaries of [REDACTED]. [REDACTED]'s shareholders owned approximately [REDACTED]% of [REDACTED]; [REDACTED]'s shareholders owned approximately [REDACTED]% of [REDACTED]. In addition, [REDACTED] Merger Sub and [REDACTED] Merger Sub, which were created solely for the purpose of acquiring [REDACTED] and [REDACTED], respectively, were merged out of existence. The merger was completed on [REDACTED].

#### The Forms 870-P

The IRS examined the [REDACTED] partnership tax return.<sup>1</sup> As a result of the examination, the parties agreed to an adjustment and executed Forms 870-P for [REDACTED] as follows:

- 1) [REDACTED] executed a Form 870-P with respect to the [REDACTED] in full settlement but did not date it.<sup>2</sup> The form was signed on behalf of the Commissioner on [REDACTED], and the form is stamped received by the Service's TEFRA Clerical Branch on [REDACTED].
- 2) [REDACTED] executed a Form 870-P with respect to the [REDACTED] in full settlement on [REDACTED]. The Form was executed on behalf of the Commissioner on [REDACTED].

#### DISCUSSION

As a preliminary matter, we recommend that you pay strict attention to the rules set forth in the IRM. Specifically, IRM 8.1.1, chapter 3, provides procedures for processing consents to

---

<sup>1</sup> The statute of limitations for assessment of the [REDACTED] year was extended by agreement with the TMP. The statute of limitations for the partnership expired on [REDACTED].

<sup>2</sup> The lack of a date next to the [REDACTED] signature may not be critical since, as discussed below, the statute of limitations runs from the date that the form is signed on behalf of the Commissioner. However, you should maintain all evidence to show the date you received the signed Form 870-P from [REDACTED].

extend the statute of limitations on assessment. In the event an extension becomes separated from the file or lost, these other records would become invaluable to establish the agreement.

#### Settlement Agreement and Extension of Statute of Limitations

The Secretary may enter into a binding settlement agreement as to a partnership item with any partner. I.R.C. § 6224(c)(1). TEFRA Forms 870 have the force and effect of closing agreements. Settlements convert partnership items to nonpartnership items and remove the settled partner from the TEFRA proceedings. I.R.C. §§ 6231(b)(1)(C) and 6226(d). Unless extended by agreement between the settled partner and the Secretary, generally the Service has one year from the date the Service's representative signs a Form 870 to make an assessment. I.R.C. § 6229(f).

The form used by the Service to extend the limitations period on assessment for partnership items converted to nonpartnership items is Form 872-F ("Consent to Extend the Time to Assess Tax Attributable to Items of a Partnership or S Corporation That Have Converted Under Section 6231(b) of the Internal Revenue Code").

You must advise the taxpayer of its right to refuse to extend the statute of limitations or, alternatively, to limit an extension to particular issues or specific periods of time. I.R.C. § 6501(c)(4)(B). We suggest using Publication 1035 when soliciting the Form 872-F to satisfy this requirement, or advising the taxpayer by some other writing. In any event, your actions should be documented in the file.

Since the Commissioner's representative is the last party to sign the Form 870-P, the one year statute of limitations begins to run on the date that the Form 870-P is executed on behalf of the Commissioner. See Form 870-P ("The one year extension of the period of limitations on assessment under section 6229(f) will not begin to run until the date the Commissioner's representative signs this form for the Commissioner."). The earliest date of signature on behalf of the Commissioner on the Forms 870-P is [REDACTED]. Thus, the statute of limitations for assessment first expires on [REDACTED], unless extended. Here, as [REDACTED] is a Saturday, you should treat the statute of limitations on assessment as expiring on Friday, [REDACTED],<sup>3</sup> unless extended.

---

<sup>3</sup> When the last day prescribed under authority of the internal revenue laws for performing any act falls on a Saturday,



Which Entity Should Enter the Consent to Extend

The deficiency procedures do not apply to partnership items which are converted because of a settlement agreement. I.R.C. § 6230(a)(2)(A). Thus, when partnership items become nonpartnership items by reason of a settlement agreement, the partnership audit provisions continue to apply for purposes of assessment or collection of any computational adjustments.

Under the non-TEFRA procedures, the Service and the taxpayer may consent in writing to an extension of time for making an assessment if the consent is executed before the normal period of assessment or before the extension date agreed upon in a prior extension agreement between the parties. I.R.C. § 6501(c)(4).

Under TEFRA, the partner should enter into an extension of the statute of limitations assessment period. I.R.C. § 6229(f). However, under the consolidated return regulations, for almost all purposes, the common parent shall be the sole agent for the group. Treas. Reg. § 1.1502-77.

Thus, because the direct partner in the [REDACTED] partnership for the year at issue is [REDACTED] and because [REDACTED] was part of the [REDACTED] and subsidiaries consolidated group, the best practice is to have both the partner [REDACTED] and the common parent [REDACTED] each sign a separate Form 872-F.

Use the following captions on the Forms 872-F. The consent with [REDACTED] should be captioned "[REDACTED] (EIN [REDACTED]) as the common parent of the consolidated group that includes [REDACTED] (EIN [REDACTED]), a partner in [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN [REDACTED]), partners in the [REDACTED] (EIN [REDACTED]). This with respect to the tax liability of [REDACTED] as a partner in the [REDACTED] for the tax year ended October 31, [REDACTED]."

You should caption the consent with [REDACTED] " [REDACTED] (EIN [REDACTED]), a subsidiary of [REDACTED]

---

the performance of such act shall be considered timely if performed on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. I.R.C. § 7503. Under I.R.C. § 7503, the statute arguably expires on Monday, [REDACTED], unless extended. However, to ensure protection of the statute of limitations, we are recommending that you treat the statute as expiring on Friday, [REDACTED].

(EIN [REDACTED]) and [REDACTED] (EIN [REDACTED]), and a partner in [REDACTED] (EIN [REDACTED]) and [REDACTED] (EIN [REDACTED]), partners in the [REDACTED] (EIN [REDACTED]). This with respect to the tax liability of [REDACTED] as a partner in the [REDACTED] for the tax year ended October 31, [REDACTED]."

#### Modification of Form 872-F

The Form 872-F available on-line has not been updated to reflect the IRS reorganization. You should modify the signature block on that on-line form to reflect that the form must be signed on behalf of the Commissioner by an appropriate delegate of the Division Executive with the Division Executive Title included. For further clarification, see the instructions regarding the signature block accompanying the new Form 872-I (catalog number 31733A).

#### Effect of [REDACTED] Merger

If the corporation that is the common parent of the group ceases to be the common parent, the following can be alternative agents for purposes of signing a consent to extend the statute of limitations:

i. the common parent of the group for all or any part of the year to which the consent applies;

ii. a successor to the former common parent in a transaction to which § 381(a) applies;

iii. the agent designated by the group under Treas. Reg. § 1.1502-77(d); or

iv. if the group remains in existence under Treas. Reg. § 1.1502-75(d)(2) or (3), the common parent of the group at the time the waiver is given. Temp. Treas. Reg. § 1.1502-77T(a)(4).

Subparagraph (a)(4)(iii) does not apply because no agent appears to have been designated by the group. Subparagraph (a)(4)(iv) does not apply because it does not appear that there was a reverse acquisition or downstream transfer since the shareholders of [REDACTED] did not own over [REDACTED]% of [REDACTED] at the completion of the merger.

[REDACTED] was the common parent for the group during the years at issue. As such, it may execute a waiver pursuant to subparagraph (i). The common parent remains the agent for the

members of the group for any year during which it was the common parent, whether or not consolidated returns are filed in subsequent years and whether or not one or more subsidiaries have become or have ceased to be members of the group. Treas. Reg. §1.1502-77(a). See also Southern Pacific v. Commissioner, 84 T.C. 395, 401 (1985). Accordingly, as a general rule, the common parent remains the proper party to extend the statute of limitations for income tax for any taxable year for which it was the common parent, as long as it remains in existence.

██████████ is an alternative agent for ██████████ for the taxable years at issue, pursuant to Treas. Reg. § 1.1502-77T(4)(ii) which provides that a successor to the former common parent in a transaction to which section 381(a) applies is an alternative agent. Section 381 applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which section 361 applies, but only if the transfer is in connection with a reorganization described in subparagraphs A, C, D, F or G of section 368(a)(1). If the subject merger is a tax-free reorganization within the meaning of sections 361 and 368(a)(1), then section 381 will apply to the merger.

To qualify as a tax-free reorganization under section 368(a)(1), the following requirements must be met: First, the transaction must be structured as a Type A, C, D, F, or G reorganization. I.R.C. §368(a)(1). Second, there must be continuity of proprietary interest. Treas. Reg. §1.368-1(b). Third, the restructuring must have been pursuant to a plan of reorganization. I.R.C. §§354 and 361. Fourth, there must be a business purpose for the reorganization. Treas. Reg. §1.368-1(c). Finally, there must be continuity of business enterprise. Treas. Reg. §1.368-1(d).

In this case it appears that the above requirements have been met. First, the merger is a Type A reorganization because it is the merger of ██████████ Sub into ██████████, with ██████████ emerging as the surviving corporation, and the merger of ██████████ Sub into ██████████, with ██████████ emerging as the surviving corporation, resulting in ██████████'s ownership of both ██████████ and ██████████, pursuant to the corporation laws of the State of Delaware. See Treas. Reg. § 1.368-2(b)(1). Second, ██████████ retained a sufficient proprietary interest in ██████████ because it exchanged its stock for the stock of ██████████. See Treas. Reg. § 1.368-1(e)(1). Third, the restructuring was pursuant to a plan of reorganization as evidenced by the Merger Agreement. Fourth, the business purpose of the reorganization is evident because there appears to be no purpose for the merger, other than

a business purpose. Finally, there is continuity of business enterprise since there has been no indication that [REDACTED] will not continue [REDACTED]'s previous business activities. See 12 U.S.C. § 214b.

In view of the foregoing, the merger appears to be a reorganization within the meaning of section 368(a)(1)(A). Therefore, [REDACTED] would be the successor to [REDACTED] in a transaction to which section 381 applies. [REDACTED] would then be an alternative agent for purposes of entering into an agreement to extend the statute of limitations on assessment for the [REDACTED] consolidated group for the tax years at issue pursuant to Temp. Treas. Reg. §1.1502-77T(a)(4)(ii).

Although [REDACTED] would be an appropriate alternative agent to sign the Forms 872 on behalf of [REDACTED] and subsidiaries, the proposed regulations § 1.1502-77 et seq. eliminate the alternative agent rules in an effort to provide certainty as to who may execute Forms 872 on behalf of consolidated groups: The alternate agent approach of Temp. Treas. Reg. §1.1502-77T lacks certainty because the IRS could deal with any one of several alternative agents and more than one corporation could initiate actions on behalf of the group. Also, a corporation could serve as an alternative agent without having been related to members of the group during the consolidated return year at issue or without being liable for the consolidated tax for that year.

We therefore recommend that the Form 872-F proposed for the common parent be executed by [REDACTED], consistent with the guidelines set forth above and in Treas. Reg. § 1.1502-77(a) and Prop. Reg. § 1.1502-77(a)(9/26/00). Although the proposed regulations are not yet in effect, they reflect the preferred thinking of the Service.

Officer to Execute the Forms 872-F on Behalf of [REDACTED] and [REDACTED]

The signature on behalf of [REDACTED] and [REDACTED] should be by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act on behalf of each of the corporations. See Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

DISCLOSURE STATEMENT

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse

effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

\* \* \*

If you have any questions, telephone Murali Balachandran of our office at (212) 264-1595, ext. 330.

ROLAND BARRAL  
Area Counsel (LMSB:FSH)

By: \_\_\_\_\_  
THEODORE R. LEIGHTON  
Associate Area Counsel